

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the matter of)	
)	
Office des Postes et Télécommunications de)	
Polynésie française)	
)	
Application for a Section 214 Authorization for)	ITC-214-20081008-00453
Overseas Cable Construction for a Submarine)	
Cable Linking the United States and French)	
Polynesia)	
)	
Application for a Cable Landing License to Land)	SCL-LIC-20081008-00017
and Operate a Common Carrier Submarine Cable)	
Linking the United States and French Polynesia)	

WAIVER ORDER

Adopted: April 12, 2010

Released: April 12, 2010

By the Chief, International Bureau:

I. INTRODUCTION

1. The Office des Postes et Télécommunications de Polynésie française (“OPT”) proposes to construct and operate a common carrier submarine cable between the United States and French Polynesia – the Honotua Cable.¹ In this order, we grant, subject to certain conditions, the request for waiver of the separate subsidiary requirement of section 63.10(c)(1) of the Commission’s rules² in connection with OPT’s pending application for the overseas cable construction section 214 authorization. As discussed below, we find that OPT has demonstrated good cause to waive the separate subsidiary requirement in this case. We therefore will allow OPT to remain as the applicant for the cable landing license and the associated international section 214 overseas cable construction authorization. We also grant OPT a waiver of section 1.767(h),³ and we will not require Wavecom Solutions, the owner of the cable landing station in the United States, to be an applicant for the cable landing license. We will process the applications accordingly.⁴

¹ Office des Postes et Télécommunications de Polynésie française, Consolidated Amendments to Application for a Cable Landing License and International Section 214 Authority, File Nos. SCL-LIC-20081008-00017, ITC-214-20081008-00453, filed May 12, 2009 (OPT Waiver Request).

² 47 C.F.R. § 63.10(c)(1).

³ 47 C.F.R. § 1.767(h).

⁴ We do not take action on the underlying applications in this Order because the Executive Branch has not completed its review of the applications for national security, law enforcement, foreign policy and trade concerns. See ¶¶ 9, 19, *infra*.

II. BACKGROUND

2. OPT is the incumbent telecommunications carrier in French Polynesia.⁵ OPT is wholly owned by the Government of French Polynesia, but is financially autonomous from the national government. OPT is subject to regulation and oversight by the Chambre Territoriale des Comptes de la Polynésie française (“CTC”) and ultimate government control.⁶ OPT is administered by a board of eight members, all of whom are citizens of French Polynesia.⁷

3. On October 8, 2008, OPT filed applications for a cable landing license (Cable License Application) and for section 214 authorization (Overseas Cable Construction 214 Application) for the Honotua Cable.⁸ OPT also filed an application for section 214 authorization to provide global facilities-based and resale service (Services 214 Application).⁹ OPT later withdrew the Services 214 Application.¹⁰

4. The Honotua Cable will provide the first fiber optic submarine cable to French Polynesia, connecting French Polynesia to the United States.¹¹ Honotua will interconnect in Hawaii with other subcables for onward connectivity from French Polynesia to the U.S. mainland and other nations.¹² OPT states that Honotua will replace existing satellite circuits, thereby providing faster, more reliable, and more affordable connectivity between the United States and French Polynesia, and allowing for the development of new commercial and trade potentials between French Polynesia, the United States and other nations.¹³ The cable will also allow for telemedicine, distance learning, scientific research and other applications which, OPT asserts, should assist in the development of the French Polynesian economy.¹⁴

5. OPT proposes to land and operate the Honotua Cable on a common carrier basis.¹⁵ The proposed Honotua Cable will be comprised of an international segment and a domestic French Polynesian segment. The international segment will link an existing cable landing station in Kawaihae, Hawaii to a new station in Papeete, French Polynesia. The domestic French Polynesian segment will link islands in

⁵ French Polynesia is an overseas territory of France, a World Trade Organization (WTO) Member country.

⁶ According to OPT, CTC regulates all public and semi-public entities established under French Polynesian law, including OPT, to ensure their performance of their chartered missions and their use of public funds for general public purposes rather than for private commercial ends. OPT Waiver Request at 3.

⁷ See File No. SCL-LIC-20081008-00017 (Cable License Application) at 5, 8; Letter to Marlene H. Dortch, FCC, from Eric Fishman and Kent Bressie, counsel for OPT, dated Dec. 30, 2009; Letter to Marlene H. Dortch, FCC, and Gregory Pinto, Department of Homeland Security, from Eric Fishman and Kent Bressie, counsel for OPT, dated Feb. 8, 2010.

⁸ File Nos. SCL-LIC-20081008-00017 (Cable License Application), ITC-214-20081008-00453 (Overseas Cable Construction 214 Application).

⁹ File No. ITC-214-20081008-00452 (Services 214 Application).

¹⁰ See letter to Marlene H. Dortch, FCC, from Eric Fishman, counsel for OPT, dated June 17, 2009 (withdrawing ITC-214-20081008-00452); International Authorizations Granted, Public Notice, DA 09-1348, 24 FCC Rcd 8161 (2009) (dismissing ITC-214-20081008-00452 at the request of Applicant).

¹¹ See letter to Marlene H. Dortch, FCC, from Eric Fishman and Kent Bressie, counsel for OPT, dated Dec. 9, 2009 (regarding *ex parte* presentation made to the International Bureau Chief and staff on December 8, 2009), Attachment at 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ OPT filed the Overseas Cable Construction 214 Application because the Honotua Cable will be a common carrier cable.

the French Polynesian archipelago to the Papenoo station. The Honotua Cable will provide transmission capacity of up to 1.28 terabits per second, with a maximum design capacity of 32 x 10 Gbps, between French Polynesia and Hawaii.¹⁶

6. OPT will own the wet link for both the international and domestic French Polynesia segments, and the cable landing stations in French Polynesia.¹⁷ The landing point in Papenoo is an existing telecommunications center, but a new cable station. The Honotua Cable will be installed in a new underground conduit between the cable station and the beach manhole.¹⁸ For the U.S. landing point, OPT has entered into an agreement with Wavecom Solutions to use the Spencer Beach cable landing station in Kawaihae.¹⁹ The Honotua Cable will be installed in the existing conduit between the cable station and the beach manhole.²⁰

7. On May 18, 2009, OPT filed a request to waive the requirements of sections 63.10(c)(1) and 1.767(h).²¹ Section 63.10(c)(1) requires any section 214 authorization holder "classified as dominant for the provision of particular services on particular routes" to provide service on such routes "as an entity that is separate from its foreign carrier affiliate...."²² Section 1.767(h) requires "any entity that owns or controls a cable landing station in the United States" to be an applicant/licensee for a cable landing station license.²³

8. The applications and waiver request were placed on Public Notice on July 2, 2009.²⁴ No comments or oppositions were filed in response to the Public Notices.²⁵ On December 14, 2009, the International Bureau granted a request for Special Temporary Authority from OPT so that it could begin construction on the segment between French Polynesia and Hawaii.²⁶

¹⁶ Cable License Application at 2-5.

¹⁷ *Id.* at 5.

¹⁸ *Id.*

¹⁹ The Application and OPT Waiver Request state that Pacific Lightnet Inc. owns the cable landing station. On January 14, 2010, Pacific Lightnet changed its name to Wavecom Solutions. See letter to Marlene H. Dortch, FCC, from Eric Fishman and Kent Bressie, counsel for OPT, dated Jan. 27, 2010. See also <http://www.wavecomsolutions.com/about/article.asp?NewsID=74>

²⁰ Cable License Application at 4.

²¹ OPT Waiver Request. In that document OPT also certified that it is aware of and will comply with the requirements of the Coastal Zone Management Act of 1972. *Id.* at 2, 14.

²² 47 C.F.R. § 63.10(c)(1).

²³ 47 C.F.R. § 1.767(h).

²⁴ Non-Streamlined Submarine Cable Landing License Applications Accepted for Filing, Report No. SCL-00089NS (rel. July 2, 2009) (File No. SCL-LIC-20081008-00017); Non-Streamlined International Applications Accepted for Filing, Report No. TEL-01371NS (rel. July 2, 2009) (File No. ITC-214-20081008-00453).

²⁵ After the comment period closed, Wavecom Solutions, Intelsat, Ltd., Hawaiian State Senator English, the Pacific Telecommunications Council, and David Lassner, filed letters in support of the applications. See letter to Marlene Dortch, FCC, from Jeremy Amen, Wavecom Solutions, dated Jan. 27, 2010; letter to Marlene Dortch, FCC, from Phillip L. Spector, Intelsat, Ltd., dated Feb. 4, 2010; letter to Marlene Dortch, FCC, from J. Kalani English, Chair, Senate Committee on Transportation, International and Intergovernmental Affairs (Hawaii), dated March 4, 2010; letter to Marlene Dortch, FCC, from John Hibbard, Pacific Telecommunications Council, dated March 23, 2010; letter to Marlene Dortch, FCC, from David Lassner, Vice President for Information Technology and Chief Information Officer, University of Hawaii, and Chair, Hawaii Broadband Task Force, dated March 29, 2010.

²⁶ ITC-STA-20091203-00528, SCL-STA-20091201-00035.

9. The Application has been coordinated with the Department of State and other Executive Branch agencies pursuant to section 1.767(b) of the Commission's rules,²⁷ and consistent with procedures established with the Department of State.²⁸ The Department of Homeland Security (DHS), with the concurrence of the Department of Justice (collectively, with DHS, the "Agencies"), requests that the Commission defer action on the applications until it can negotiate an agreement on assurances to mitigate risks associated with the foreign government ownership of the cable.²⁹ DHS states that the terms of the assurances that the Agencies consider to be appropriate for the cable will be based, in part, on whether the Commission requires OPT to establish a separate subsidiary or grants OPT's waiver request and allows OPT to own directly the U.S. portion of the cable and be the sole applicant/licensee/authorization holder for the cable.³⁰

III. DISCUSSION

A. Waiver of Section 63.10(c)(1)

10. The Commission adopted the separate subsidiary requirement in section 63.10(c)³¹ as part of the dominant carrier safeguards for international section 214 authorization holders in the *Foreign Participation Order*, which established an open entry standard for applicants from World Trade Organization (WTO) Member countries.³² The Commission was concerned that "a foreign carrier that possesses market power in a relevant market on the foreign end of an international route could leverage its market power into the downstream U.S. international services market."³³ To aid in the prevention and detection of anticompetitive conduct in downstream markets, the Commission requires a carrier with market power on the foreign end of an international route to provide service in the United States through a corporation that is separate from the foreign carrier, to maintain separate books of account, and not to have joint ownership of switching and transmission facilities.³⁴ The Commission found that such requirements should not impose a significant burden because most foreign carriers operating in the United States do so in a manner that is consistent with such requirements.³⁵ The Commission stated, however, that "to the extent a . . . carrier finds these requirements do indeed hamper its operations, and believes that such integrated operations do not pose a potential threat to competition in the U.S. international services market, we are open to requests to waive these rules."³⁶

²⁷ 47 C.F.R. § 1.767(b).

²⁸ See *Review of Commission Consideration of Applications under the Cable Landing License Act*, IB Docket No. 00-106, Report and Order, 16 FCC Rcd 22167, 22192-93, ¶¶ 51-52 (2001) (*Cable Landing License Order*); Streamlined Procedures for Executive Branch Review of Submarine Cable Landing License Requests, State Department Media Note (Revised) (rel. Dec. 20, 2001) available at: <http://2001-2009.state.gov/r/pa/prs/ps/2001/6951.htm>

²⁹ Letter to Marlene H. Dortch, FCC, from Greg Pinto, Office of Policy Development, U.S. Department of Homeland Security, dated Aug. 28, 2009.

³⁰ *Id.*

³¹ 47 C.F.R. § 63.10(c).

³² See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket 97-142, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891, 23969-24023, ¶¶ 177-296 (1997) (*Foreign Participation Order*), recon. 15 FCC Rcd 18158 (2000).

³³ *Foreign Participation Order*, 12 FCC Rcd at 24004, ¶ 254.

³⁴ *Id.* at 24006, ¶ 257.

³⁵ *Id.*

³⁶ *Id.* at 24010-11, ¶ 266.

11. OPT contends that it cannot create a separate subsidiary without exposing itself to unacceptable legal and financial risk and thus it seeks waiver of the separate subsidiary requirements. According to OPT, the CTC, which regulates OPT, has found that the creation of subsidiaries is unlawful under Article 30 of La Loi Organique (French Polynesia's constitution).³⁷ While OPT states that it does not agree with the CTC on this issue, OPT states that it would take years of litigation to attempt to overturn the CTC decision.³⁸

12. In addition, OPT asserts that compliance with the separate subsidiary requirement, if it were legally able to do so, could expose OPT to severe financial risks. OPT states that it has secured three outside sources of funding with the understanding that OPT will control and operate the Honotua cable in its entirety.³⁹ OPT contends that transferring ownership of the portion of the cable in the United States to a separate subsidiary would require renegotiation of these outside sources of funding, which could lead to less-advantageous financial terms or result in the loss of funding altogether.⁴⁰

13. OPT further argues that waiving the separate subsidiary requirement for the operation of the Honotua Cable will not pose a potential threat to competition in the U.S. international services market. First, OPT notes that it will not offer international services in the United States.⁴¹ Second, OPT agrees to accept a number of voluntary safeguards that it says will meet the public interest goals of the separate subsidiary requirement. Specifically, OPT agrees to:

(a) establish a separate operating division within OPT with respect to the ownership and operation of the Honotua Cable within the United States;

(b) maintain separate books of account for this separate division and for the portion of the Honotua Cable within the United States;

(c) file quarterly reports summarizing the provision and maintenance of all basic network facilities procured from OPT's local exchange and other French Polynesian domestic operations and operating divisions and affiliates; and,

(d) provide the Commission with all new and revised *cahiers des charges* (conditions for operations that include tariffs) filed publicly with the French Polynesian Ministry of Economy and Finance for telecommunications service between French Polynesia and the United States.⁴²

OPT also acknowledges that it will remain subject to the other dominant carrier safeguards, including the filing of quarterly traffic and revenue reports⁴³ and quarterly circuit status reports⁴⁴ for the U.S.-French

³⁷ OPT Waiver Request at 4. *See also id.*, n.4 (stating that the French Polynesian government may establish an OPT subsidiary in circumstances where there is a joint venture with a private-sector entity, which is not the case with the Honotua Cable).

³⁸ OPT Waiver Request at 4.

³⁹ The outside funding sources for the Honotua Cable are (1) a grant from the Government of French Polynesia; (2) a commercial loan from Banque Socredo; and (3) funding through a French tax-incentive program. OPT will also use funds allocated by OPT in its operating budget to fund the Honotua Cable. OPT Waiver Request at 6.

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 8. OPT withdrew its Services 214 Application on June 17, 2009. *See* footnote 10, *supra*.

⁴² OPT Waiver Request at 9-10.

⁴³ 47 C.F.R. § 63.10(c)(2).

⁴⁴ 47 C.F.R. § 63.10(c)(4).

Polynesia route – as well as other Commission rules, including the “no special concessions” requirements.⁴⁵

14. We find that OPT has shown good cause for waiver of the separate subsidiary requirement for the construction and operation of the Honotua Cable.⁴⁶ OPT faces unique circumstances in that the French Polynesian regulatory body, the CTC, has ruled that OPT is legally incapable of creating a separate subsidiary. Although it may be possible for OPT to have that ruling overturned, the outcome is uncertain, the time it would take for a resolution of the legal issue would delay the many benefits anticipated from the construction and operation of the cable, and compliance with the separate subsidiary requirement could jeopardize the funding for the cable. In short, OPT clearly has demonstrated that application of the separate subsidiary requirement here would impose a significant burden. We find further that OPT’s compliance with the voluntary safeguards it has proposed, in addition to the other dominant carrier safeguards, should provide the Commission sufficient means to detect potentially anti-competitive actions of OPT in the operation of the Honotua Cable.⁴⁷ The establishment of a separate division and the maintenance of separate books of account, along with the filing of maintenance and provision reports, provides similar, albeit not equal, protection against anticompetitive conduct in the operation of the cable.⁴⁸ We find that level of protection to be adequate here because the concerns the Commission addressed in the *Foreign Participation Order* that led to the adoption of the separate subsidiary requirement are mitigated in this case by the fact that OPT will not be providing international services in the United States,⁴⁹ but rather will be operating and providing capacity on a common carrier submarine cable.⁵⁰

15. Consequently, we grant OPT’s request and waive the separate subsidiary requirement in section 63.10(c)(1) of the Commission’s rules for the construction and operation of the Honotua Cable. Grant of the waiver is conditioned on OPT complying with the voluntary commitments it made in the OPT Waiver Request, as discussed above.⁵¹ OPT must create a separate operating division for the ownership and operation of the U.S.-portion of the Honotua Cable and maintain separate books of account for this separate division. Those books must be available to the FCC upon request. OPT must also comply with the other requirements of the dominant carrier safeguards, specifically the filing of (a) quarterly traffic and revenue reports for the U.S.-French Polynesia route;⁵² and (b) quarterly circuit status

⁴⁵ The “no special concessions” rule prohibits U.S. carriers from agreeing to accept special concessions from any foreign carriers that possess sufficient market power on the foreign end of a U.S.-international route to affect competition adversely in the U.S. market. 47 C.F.R. § 63.14. See OPT Waiver Request at 10-11.

⁴⁶ See 47 C.F.R. § 1.3 (2003). See also *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1167 (1990); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (1969).

⁴⁷ We also note that OPT will be subject to the Commissions’ rules and safeguards for cable landing licensees, including the no special concession rule and reporting requirements. See 47 C.F.R. § 1.767(g)(5), 1.767(l). See also *Cable Landing License Order*, 16 FCC Rcd at 22182-86, ¶¶ 30-39.

⁴⁸ See generally *Foreign Participation Order*, 12 FCC Rcd at 24003-12, ¶¶ 252-269.

⁴⁹ OPT certifies that its service to U.S. customers will be limited to the provisioning of capacity on the Honotua Cable between the French Polynesian and U.S. landing stations, and that it will not offer or provide backhaul service to any U.S. point of presence. OPT Waiver Request at 9.

⁵⁰ In the *Foreign Participation Order*, the Commission discussed the provision of international services by a carrier affiliated with a foreign carrier with market power on the foreign end of a route and did not specifically discuss the applicability of the separate subsidiary requirement to cable landing licensees. See generally *Foreign Participation Order*, 12 FCC Rcd at 24003-12, ¶¶ 252-269.

⁵¹ See ¶ 13, *supra*.

⁵² 47 C.F.R. § 63.10(c)(2).

reports for the U.S.-French Polynesia route,⁵³ as well as the other applicable requirements set forth in the Commission's rules, including the "no special concessions" requirements.⁵⁴

B. Waiver of Section 1.767(h)(1)

16. Section 1.767(h) requires "any entity that owns or controls a cable landing station in the United States" to be an applicant for or licensee on a cable landing license.⁵⁵ The purpose of this requirement is to ensure that entities having a significant ability to affect the operation of the cable become licensees so that they are subject to the conditions and responsibilities associated with the license.⁵⁶ OPT seeks a waiver of the rule so that Wavecom Solutions, which owns the U.S. landing station, does not have to be an applicant/licensee.

17. OPT asserts that Wavecom Solutions will not be able to affect significantly the operation of the Honotua Cable, and thus it is not necessary for Wavecom Solutions to be a licensee to ensure compliance with the Cable Landing License Act, the Commission's rules or the terms of the cable landing license.⁵⁷ OPT has entered into a landing party agreement ("LPA") with Wavecom Solutions pursuant to which OPT will have exclusive control over and access to Honotua Cable terminal equipment, which OPT will collocate at the Kawaihae cable station building. Equipment for the Honotua Cable will be separately caged and controlled exclusively by OPT from its network operations center in French Polynesia. OPT will retain operational authority over Honotua Cable facilities and provide direction to Wavecom Solutions in all matters relating to the Honotua Cable. Pursuant to the LPA, Wavecom Solutions will perform certain limited "remote hands" monitoring, testing, and maintenance services on OPT's equipment, which will be performed in accordance with OPT's directions.⁵⁸

18. While Wavecom Solution is the owner of the cable landing station in Kawaihae where the Honotua Cable will land in the United States, we find that, based upon the agreements between OPT and Wavecom Solutions described above, Wavecom Solutions will not have the ability to affect the operation of the Honotua Cable. OPT will retain effective operational authority and provide direction to Wavecom Solutions in all matters relating to the Honotua Cable.⁵⁹ Accordingly, we grant OPT a waiver of section 1.767(h)(1) and do not require Wavecom Solutions to be an applicant/licensee for the cable landing license.⁶⁰

⁵³ 47 C.F.R. § 63.10(c)(4).

⁵⁴ 47 C.F.R. § 63.14. See OPT Waiver Request at 10-11.

⁵⁵ 47 C.F.R. § 1.767(h)(1).

⁵⁶ See *Cable Landing License Order*, 16 FCC Rcd at 22194-95, ¶¶ 53-54.

⁵⁷ OPT Waiver Request at 12.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ The Bureau has previously granted waivers of 47 C.F.R. § 1.767(h)(1) under similar circumstances. See, e.g., *Actions Taken Under Cable Landing License Act*, SCL-LIC-20070222-00002, Public Notice, 23 FCC Rcd 227 (PD/IB 2008); *Actions Taken Under Cable Landing License Act*, SCL-LIC-20090302, Public Notice, 24 FCC Rcd 7828 (PD/IB 2009).

C. Conclusion

19. As discussed herein, we grant the OPT request to waive the requirements of sections 1.767(h) and 63.10(c)(1) for the construction and operation of the Honotua Cable. We find that OPT has demonstrated good cause for the waivers. We will therefore process OPT's Overseas Cable Construction Application and Cable License Application with OPT as the sole applicant. We do not act on the underlying applications at this time because the Agencies must complete their review of the application for national security, law enforcement, foreign policy and trade concerns, and, if necessary, negotiate the appropriate security agreement with OPT.⁶¹

IV. ORDERING CLAUSES

20. Accordingly, IT IS ORDERED that the request for a waiver of the separate subsidiary requirement in section 63.10(c)(1) of the Commission's rules, 47 C.F.R. § 63.10(c)(1), filed by the Office des Postes et Télécommunications de Polynésie française IS GRANTED ON CONDITION that the Office des Postes et Télécommunications de Polynésie française comply with the voluntary safeguards set forth in its waiver request, as discussed herein.

21. IT IS FURTHER ORDERED that the request for a waiver of section 1.767(h) of the Commission's rules, 47 C.F.R. § 1.767(h), filed by the Office des Postes et Télécommunications de Polynésie française IS GRANTED.

22. IT IS FURTHER ORDERED that this *Waiver Order* SHALL BE EFFECTIVE upon release. Petitions for reconsideration under section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, may be filed within thirty days of the date of public notice of this order.

FEDERAL COMMUNICATIONS COMMISSION

Mindel De La Torre
Chief, International Bureau

⁶¹ See ¶ 9, *supra*. In conducting its public interest analysis of applications, the Commission will take into account the record before it and accord deference to Executive Branch expertise on national security, law enforcement, foreign policy and trade concerns. See *Foreign Participation Order*, 12 FCC Rcd 23919-21, ¶¶ 61-66.